Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

S.D. MYERS, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding, in conflict with the First Circuit, that refusing to contract with a company because the company's lawful conduct in other jurisdictions does not conform to the government's social policy (here, domestic partner benefits) is not an economic sanction prohibited by *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (Due Process violation)?

2. Did the Ninth Circuit err in holding, in conflict with the First Circuit and this Court, that the government's use of its contract power to regulate, in other jurisdictions, lawful conduct that is unrelated to the contract does not violate the Interstate Commerce Clause?

3. Did the Ninth Circuit err in holding, in conflict with a decision of this Court, that a city or state has an interest in protecting nonresidents that outweighs the burden on interstate commerce of regulating commerce (i.e., employee benefits) in other states?

4. In the alternative, should this Court grant certiorari, vacate the Ninth Circuit's opinion, and remand for consideration of facts relating to new conflicting laws and the actual extraterritorial effects of the ordinance that were not before the court at the time of its opinion?

CORPORATE DISCLOSURE STATEMENT

S. D. Meyers, Inc. is a privately held corporation that has no parent corporation. No publicly held company owns 10% or more of the stock in S. D. Myers, Inc.

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PETITION FOR A WRIT OF CERTIORARI

S.D. Myers respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that ruled, in conflict with decisions of this Court and the First Circuit, that the City of San Francisco may regulate social policy across the nation through its contract power.

In view of the conflicting authority about the legitimacy of imposing social policies through government contracts, the recent proliferation of city policies requiring contractors to provide domestic partner benefits, and the important question of whether cities may validly export their social policies outside their borders, the Court should grant the petition for certiorari.

OPINIONS BELOW

The district court's original unpublished summary judgment in this case dated May 27, 1999, is reprinted at Appendix ("App.") 23a. The opinion of the United States Court of Appeals for the Ninth Circuit that is at issue here is reported at 253 F.3d 461 (2001), and is reprinted at App. 1a. The district court's unpublished opinion on remand dated June 24, 2002, is reprinted at App. 49a. The Ninth Circuit's opinion affirming the second dismissal is reported at 336 F.3d 1174 (2003), and is reprinted at App. 56a. The unpublished denial of rehearing *en banc*, dated September 26, 2003, is reprinted at App. 66a.

JURISDICTION

The Ninth Circuit opinion at bar remanded the case for further proceedings that are not at issue on this appeal. The Ninth Circuit issued its second opinion on July 29, 2003, and denied a timely petition for rehearing and rehearing *en banc* on September 26, 2003. This petition has been filed within 90

days of the denial of the petition for rehearing or rehearing *en banc*, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS/ORDINANCES INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ." The Interstate Commerce Clause, Article 1, section 8 of the United States Constitution, authorizes the federal Congress "To regulate Commerce . . . among the several States . . . ." San Francisco City Administrative Code Chapter 12B[1] requires all city contractors to offer employee benefits to registered domestic partners of unmarried employees—opposite-sex or same-sex—on the same basis as to the spouses of married employees. Chapter 12B is set forth at App. 68a.

STATEMENT OF THE CASE

The intent and practical effect of San Francisco City Administrative Code Chapter 12B (the "ordinance") is to regulate the employee benefits of thousands of employers throughout the United States. The ordinance currently regulates employee benefits for 1,722,000 employees in 39 states and nearly 500 cities. Over three quarters of U.S. employers that offer domestic partner benefits do so to comply with the ordinance.

A. Statement of Facts

S.D. Myers, an Ohio based corporation, performed maintenance on electrical transformers for the City pursuant to two contracts between 1995 and 1997. Summary Judgment at 5, App. 27a. In September 1997 S.D. Myers submitted another

[1]Available at www.sfgov.org/site/sfhumanrights_page.asp?id=5922.

bid to maintain City-owned electrical transformers located on property controlled by the City, but outside City limits. *Id.* Although S.D. Myers was the lowest bidder, the City rejected the bid solely because S.D. Myers refused to agree to provide domestic partner benefits under the recently enacted ordinance. *Id.* If S.D. Myers had been awarded the contract, it would have used *Ohio-based employees* to perform it. Dana S. Myers Aff., ¶ 10, App. 97a.

San Francisco had enacted the ordinance earlier in 1997, purportedly to prohibit discrimination based on sexual orientation. *S.D. Myers v. City and County of San Francisco*, 253 F.3d 461, 465 (2001). As written, the ordinance expressly applied to all U.S. operations of employers that contract with the City. § 12B.1(d), App. 72a.[2] In another proceeding, the district court invalidated the portion of the ordinance that explicitly applied to all U.S. operations of contractors. *See Air Transport Ass'n v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998). Even so, the practical effect of the remainder of the ordinance is that it applies to all operations of City contractors, wherever they have employees.

B. Proceedings Below

S.D. Myers filed this action against the City and County of San Francisco and the San Francisco Human Rights Commission (collectively, "City") in the United States District Court for the Northern District of California in December of 1997. The suit challenged the ordinance under the Due Process Clause, the Interstate Commerce Clause, ERISA preemption and several state-law grounds. *Id.* at 1. The trial judge granted summary judgment on behalf of the City on May 27, 1999. *Id.*

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[2]The definition of "contract" excludes "contracts for a cumulative amount of $5,000 or less per vendor in each fiscal year." § 12B.1(c), App. 70a.

On appeal the Ninth Circuit rejected S.D. Myers' claim that the ordinance has extraterritorial effects in violation of the Due Process Clause. The court held that declining to contract with an entity on the ground of the entity's refusal to comply with a social policy is not an economic sanction. *S.D. Myers*, 253 F.3d at 472. The Ninth Circuit also rejected S.D. Myers' argument that the ordinance has a direct impact on interstate commerce. It held that the ordinance did not have a direct impact on interstate commerce in the absence of evidence of "actual and imminent" conflicting legislation. *Id.* at 469-70. The court further held that the City may use its contract power to regulate employer policies unrelated to the contract, even for employees working outside its borders, and that the local benefit of the ordinance outweighs the burden on interstate commerce. *Id.* at 469, 471-72.

Although the Ninth Circuit affirmed all of the rulings of the trial court, it remanded the question of whether the ordinance was in conflict with a new California domestic partnership law. *S.D. Myers*, 253 F.3d at 473. On remand the trial court again ruled for the City, and the Ninth Circuit affirmed on appeal. *S.D. Myers v. City and County of San Francisco*, 336 F.3d 1174 (2003) (*S.D. Myers II*). The court denied a motion for rehearing or rehearing *en banc* on September 26, 2003. App. 66a.

C. Subsequent Events

In the courts below S.D. Myers argued that because of its extraterritorial effect, the ordinance would inevitably conflict with other laws, which would subject S.D. Myers and other contractors to inconsistent rights and obligations.[3] That

[3]Under this Court's Commerce Clause cases, different states' regulations may be inconsistent even though it is possible to comply with all of them. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (citing cases where it was possible to comply with inconsistent regulations).

potential became real when, subsequent to the briefing on the appeal at issue, Nebraska voters adopted a voter-initiated constitutional amendment that conflicts with the ordinance. Article I, § 29 of the Nebraska Constitution provides that "[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." App. 171a. Accordingly, employers in Nebraska have a state constitutional right not to be required to provide same-sex domestic partner benefits.[4] Further, the Michigan legislature is currently considering a resolution that would submit a similar constitutional amendment to Michigan voters. The proposed Michigan amendment provides that no relationship other than marriage between a man and a woman "shall be recognized as a marriage or its legal equivalent . . . ." Michigan Senate Joint Resolution E (2003), App. 172a.[5] This provision, if adopted, would give Michigan employers a state constitutional right not to be required to treat domestic partnerships as the equivalent of marriage. The Ninth Circuit did not consider either of these measures in rendering its decision.

Furthermore, subsequent to the Ninth Circuit's decision, Defendant/Respondent San Francisco Human Rights Commission ("SFHRC") *reported the actual impact of the ordinance* on its website as "Statistical Reports." The Statistical Reports currently available on the SFHRC website are:

Equal Benefits Five-Year Report
Equal Benefits Four-Year Report - Oct. 25, 2001
Equal Benefits Three-Year Report - Aug. 10, 2000

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[4]The Due Process Clause prohibits a state from requiring a business to waive a constitutional right in order to do business in a state. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (state could not make waiver of constitutional right to resort to federal court condition of doing business).

[5]Available at www.michiganlegislature.org/documents/2003-2004/jointresolutionintroduced/senate/pdf/2003-SIJR-E.pdf.

Equal Benefits Two-Year Report - Aug. 12, 1999
Equal Benefits Six-Month Report - Jan. 06, 1998.[6]

(Hereinafter, Five-Year Report, Four-Year Report, etc.) These Statistical Reports reveal that even after the 1998 *Air Transport Association* decision invalidated the portion of the ordinance that explicitly applied to all of a contractor's U.S. operations, the practical effect of the ordinance is to regulate extraterritorial conduct. From the first Statistical Report to the last, SFHRC boasts about the interstate impact of the ordinance. The Five-Year Report describes the impact as follows:

> On June 1, 1997, the City and County of San Francisco set in motion a revolution. . . .
>
> Despite the fact that the concept of offering domestic partner benefits to employees was already over a dozen years old at the time the Equal Benefits Ordinance was enacted, only 500 employers in the U.S. offered such benefits. Today, *over 4,500 employers extend these benefits*. The San Francisco Equal Benefits Ordinance has been credited with playing a major role in this explosion of domestic partner benefits *with over 75% of the companies offering domestic partner benefits doing so in compliance with the City's contracting requirements*. . . .
>
> The number of employees working for City contractors that have utilized medical benefits for their domestic partners has surpassed 50,000 and can be found in at least *39 states and 500 cities* across the country. Even when, a year after the law went into effect, a court decision gave companies the option to limit where they extended nondiscriminatory benefits,

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[6]Available at www.sfgov.org/site/sfhumanrights_page.asp?id=5902#statistics.

> just over one percent of the complying companies chose to do so.

SFHRC Five-Year Report at 1, App. 103-04a (emphasis added; footnote omitted). The Three-Year Report likewise touts the nationwide impact of the ordinance:

> *The employee benefits landscape has been forever changed as a result of the Equal Benefits Ordinance.* . . . In the thirty-seven months since the law went into effect, *a new insurance market has been created to which nearly 150 insurers from across the country have responded. . . .*
>
> * * * *
>
> With equal benefits ordinances coming into effect in other cities, the positive *impact created by San Francisco's model is rapidly expanding.* This expansion is likely to *increase pressure on companies* still resistant to compliance.

SFHRC Three-Year Report at 11, App. 161-62a (emphasis added).[7]

Each of the other SFHRC Statistical Reports likewise describes the ordinance's significant impact on interstate commerce. Because these reports were neither produced during discovery nor available on the SFHRC website during discovery, the Ninth Circuit did not have the opportunity to consider this overwhelming evidence of the extraterritorial impact of the ordinance.

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[7]According to SFHRC, other cities or counties with policies requiring that contractors provide domestic partner benefits include Berkeley, Los Angeles, Oakland and San Mateo County California, Seattle and Tumwater Washington, Portland, Maine and Broward County, Florida. Five-Year Report at 10 and n. 20, App. 119a, 130a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT REFUSING TO DO BUSINESS WITH A COMPANY IS NOT AN ECONOMIC SANCTION, THUS CREATING A CONFLICT WITH THE FIRST CIRCUIT.

In *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996), this Court held:

> it is clear that no single State could . . . impose its own policy choice on neighboring States. Similarly, one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.

(Citing *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881), *Gibbons v. Ogden*, 9 Wheat 1, 194-196 (1824), *Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989), and *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).) The Court went on to hold as follows:

> We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States.

Id. at 572.

The Ninth Circuit rejected S.D. Myers' claim that barring it from the San Francisco market for failing to comply with San Francisco's social policy was an economic sanction. *S.D. Myers*, 253 F.3d at 472. The court held that because breach of contract penalties apply only if a contractor breaches an agreement to comply with the ordinance, and a contractor "will be denied the ability to contract with the City only after it has

chosen not to meet the City's requirements," there was no economic sanction within the meaning of this Court's ruling in *BMW*. *Id.*[8]

The First Circuit came to the opposite conclusion about the meaning of *BMW* in evaluating a Massachusetts statute with similar extraterritorial effects and purposes. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1999), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).[9] In the statute at issue in *Natsios*, Massachusetts expressed its disapproval of the Burmese government's violations of human rights by prohibiting state contracts with entities on a "black" list of companies doing business with Burma, except in limited circumstances. *Id.* at 46-47. The purpose of the law was to "'apply indirect economic pressure against the Burma regime for reform.'" *Id.* at 47 (quoting Massachusetts' argument). The First Circuit viewed the law as an economic sanction that was "attempting to regulate conduct beyond [Massachusetts'] borders . . . ." *See id.* at 69. In finding improper extraterritorial regulation, the court quoted *BMW*'s holding "'that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States.'" *Id.* (quoting *BMW*, 517 U.S. at 572).[10]

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[8]The Ninth Circuit held that under a facial challenge, the ordinance would not violate the Due Process Clause even if it constituted an economic sanction. *S.D. Myers*, 253 F.3d at 472. However, S.D. Myers challenged the ordinance on both facial and as-applied grounds. Opening Appellate Br. at 42-44 (as-applied); Summary Judgment at 21-22, App. 40-41a (holding that the effects as applied to S.D. Myers in Ohio did not violate Due Process or the dormant Commerce Clause).

[9]This Court affirmed on the basis of federal preemption, and did not address the other grounds for the First Circuit's decision. *Crosby*, 530 U.S. at 374 n.8.

[10]The court in *Natsios* quoted *BMW* in the context of its discussion of the dormant Commerce Clause, as it relates to interpretation of the Foreign Commerce Clause. But the *BMW* holding about economic sanctions clearly involved a due process issue.

The First Circuit went on to condemn the Burma statute "because both the intention and effect of the statute is to change conduct beyond Massachusetts's borders." *Natsios*, 181 F.3d at 69. Likewise, both the intention and effect of the San Francisco ordinance is to change conduct beyond its borders. *See* Five-Year Report at 12-13, App. 123a ("it is still City policy to encourage contractors to comply throughout the U.S."); *id.* at 1, App. 104a (City contractors providing domestic partner benefits "in at least 39 states and 500 cities across the country"); Four-Year Report at 7, App. 142a ("The impact of the San Francisco Equal Benefits Ordinance is being felt across the United States . . . . As Equal Benefits Ordinances are enacted in other cities, the positive impact created by San Francisco's model will continue to expand. . . . [T]he cost of discriminating will continue to mount").[11]

Like the First Circuit, the Ninth Circuit should have recognized that refusing to contract with businesses like S.D. Myers is an improper economic sanction.

II. THE NINTH CIRCUIT HELD THAT SAN FRANCISCO MAY USE ITS CONTRACT POWER TO IMPOSE ITS SOCIAL POLICY BEYOND ITS BORDERS.

A. The Ninth Circuit's Decision Is in Conflict with Decisions of the First Circuit and This Court

The Ninth Circuit held that the San Francisco ordinance does not directly regulate interstate commerce because it imposes its social policy "through contract rather than by legislative fiat." *S.D. Myers*, 253 F.3d at 469; *see also id.* at 472 ("narrowly construed the Ordinance only applies in the City, on City-owned property, or as to employees working on a City contract"). Justifying the imposition of social policies

[11]The Court may take judicial notice of the SFHRC Statistical Reports because they are official documents, published by the Defendants/ Respondents, addressing the interstate impact of the ordinance.

through contract power is in conflict with the First Circuit and flies in the face of this Court's precedent.

In *Natsios*, Massachusetts (like the City below) argued that any company that did not wish to comply with its social goals "can simply forgo contracts with Massachusetts, or simply beat the next highest bidder's price by ten percent." *Natsios*, 181 F.3d at 70. The First Circuit rejected that claim:

> Every discriminatory state law can be avoided by withdrawing from the enacting state. In *Healy*, for example, liquor distributors could have avoided the New York law by staying out of the New York liquor market. To allow state laws to stand on this ground, however, would be to read the Commerce Clause out of the Constitution. Moreover, the relative influence of a state's purchasing power cannot suffice to save discriminatory legislation.

Id. The state's contract power did not justify exporting its social policy outside its jurisdiction.

Moreover, this Court's precedent repudiates the Ninth Circuit's ruling that a city's contracting power is sufficient to regulate commerce beyond the subject matter of the contract and beyond its jurisdiction. In *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984), the plurality rejected the argument that the power to contract permits extraterritorial regulation. They observed that the market-participant doctrine:

> does not necessarily mean that the Commerce Clause has no application within the boundary of formal privity. The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant." Contrary to the State's contention, *the doctrine is not carte blanche to impose any conditions that the State has the*

> *economic power to dictate*, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.
>
> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. *The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.*

Id. (quoting *White v. Massachusetts Council of Constr. Workers, Inc.*, 460 U.S. 204, 211 n. 7 (1983); record citation omitted; emphasis added).

The statute in *Wunnicke* required that timber harvested from state land must be at least partially processed within the state prior to export. The state enforced the statute by including the processing requirement in contracts for sale of the timber. *Id.* at 84. Alaska sold timber at a significantly reduced rate when its contracts required in-state processing. *Id.* at 85. But the Court invalidated the statute because it regulated commerce other than the sale of timber, i.e., it regulated the market for timber processing as well.[12]

The San Francisco ordinance has a far greater impact on interstate commerce than the timber statute in *Wunnicke*. Whether S.D. Myers offers domestic partner benefits to nonresidents of San Francisco (including its Ohio employees) has no relevance whatsoever to the market of electrical

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[12]Under the circumstances, the statute could have been construed to require "paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber." *Wunnicke*, 467 U.S. at 103 (Rehnquist, J., dissenting). Regardless, the statute did not purport to regulate conduct totally unrelated to the contract, as does the San Francisco ordinance.

transformer maintenance. Further, unlike the statute in *Wunnicke*, the San Francisco ordinance was designed to regulate not a specific industry, but all commerce of City contractors, regardless of where it occurs.[13] Like the Massachusetts statute invalidated in *Natsios*, the practical effect of the San Francisco ordinance is to export the government's social policy far beyond its borders. That effect constitutes a direct regulation of interstate commerce that is a *per se* violation of the dormant Commerce Clause. *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State"); *Brown-Forman Distillers Corp. v. New York St. Liquor Authority*, 476 U.S. 573, 579 (1986) (same).

The result of the Ninth Circuit's ruling is that the City has the power to impose social conditions through its contracts. That ruling is in conflict with *Natsios* as well as this Court's opinion in *Wunnicke*. This Court's precedents do not permit a state, much less a city, to regulate conduct beyond its borders through contracts.

B. The Ninth Circuit, in Effect, Held that a City May Control Conduct throughout the Nation If There Is No Conflicting Legislation.

The Ninth Circuit rejected S.D. Myers' argument that the ordinance could conflict with the laws of other states.[14] It held:

> By choosing to attack the Ordinance on its face, Myers has the burden of showing that the Ordinance will have

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[13]Employee benefits obviously constitute commerce, or ERISA would be invalid. *Cf. Cannon v. Group Health Serv. of Okla.*, 77 F.3d 1270, 1275 (10th Cir. 1996) (referring to the "Commerce Clause authority to enact ERISA").

[14]Section II.C. *infra* discusses the court's failure to address S.D. Myers' as-applied challenge to the extraterritorial effect of the ordinance.

> the practical effect of directly regulating interstate commerce under all circumstances. This means that, at a minimum, *Myers must either present evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent.*

S.D. Myers, 253 F.3d at 469-70 (emphasis added). In other words, if there is no conflicting legislation in place or imminent, San Francisco may export its social policy without constraint.

Such a holding does not comport with this Court's Commerce Clause or Due Process Clause cases. It is beyond dispute that "[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). In a similar vein, this Court has observed that "while we do not doubt that Congress has ample authority to enact . . . a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States." *BMW*, 517 U.S. at 571 (citing *Bonaparte*); *see also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976) ("at least since . . . [1852] it has been clear that 'the Commerce Clause . . . even without implementing legislation by Congress is a limitation upon the power of the States'") (citations omitted). If a state may not impose its policy choices on the entire nation, neither may a city.

Most importantly, inconsistent legislation has subsequently been proposed and adopted. "This Court's . . . Commerce Clause cases . . . have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (citing cases). Inconsistent regulations, within this Court's jurisprudence, are not limited to statutes that

are so in conflict that it is impossible to comply with both. For instance, in *Brown-Forman*, the plaintiff was able to comply with all applicable laws, providing it gave up its ability to give promotional prices in other states. *Brown-Forman*, 476 U.S. at 583-84. The statute at issue in *Healy* was also deemed inconsistent with other state's regulations, even though it was possible to comply with each. *Healy*, 491 U.S. at 339; *see also id.* at 336-37 ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"). The issue of inconsistent regulations is not whether employers may comply with the ordinance and other state's laws, but whether the ordinance affects employers' ability to take advantage of the laws of other states in which they do business.

Article I, § 29 of the Nebraska Constitution gives employers a state constitutional right not to offer domestic partner benefits to same-sex couples in Nebraska.[15] *See* Neb. Const. art. I, sec. 29 (2000), App. 171a.[16] The pending Michigan constitutional amendment would give employers a right not to treat domestic partnerships as the equivalent of marriage. *See* MI Senate Resolution E (2003), App. 172a.[17] Because the ordinance requires that employers treat registered domestic partnerships as the equivalent of marriage, it is

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[15]Nebraska employers need not offer benefits to opposite-sex domestic partners either because the state does not recognize cohabitation as the equivalent of marriage. *See Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554, 560 (1956) (common law marriage abolished).

[16]According to SFHRC, there are Nebraska contractors who offer domestic partner benefits in compliance with the ordinance. Five-Year Report at 7, Figure 10, App. 114a. Those employers have relinquished a state constitutional right in order to do business with San Francisco. A state (or city) may not require a corporation to waive a constitutional right to do business in its jurisdiction. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922).

[17]Available at www.michiganlegislature.org/documents/2003-2004/ jointresolutionintroduced/senate/pdf/2003-SIJR-E.pdf

inconsistent with these provisions. The conflict between the ordinance and the provisions of these laws represents the kind of inconsistent rights and obligations that repeatedly have been held to violate the dormant Commerce Clause. *See Healy*, 491 U.S. at 336-37; *CTS Corp.*, 481 U.S. at 88; *Brown-Forman*, 476 U.S. at 583-84.

C. The Ninth Circuit's Misconstrual of the Nature of a *per se* Dormant Commerce Clause Violation Is in Conflict with the Second Circuit.

S.D. Myers argued before the trial court and on appeal that the extraterritorial effects of the ordinance *as applied* rendered it invalid *per se*. See Summary Judgment at 19-20, App. 39a (S.D. Myers "argue[s] that the Ordinance is invalid *per se* because it directly affects [S.D. Myers] by subjecting it to inconsistent legislation"); S.D. Myers Opening Br. at 42-44 (arguing extraterritorial effects on S.D. Myers in Ohio). Nevertheless, the Ninth Circuit treated the *per se* claim as facial only, and held that S.D. Myers could not succeed without establishing that there is no set of circumstances under which the ordinance would be valid. *S.D. Myers*, 253 F.3d at 466-67, 471.[18]

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[18]The Ninth Circuit compounded its error by ruling factually against S.D. Myers on an uncontroverted claim it made in the district court–that the ordinance applied to its Ohio operations. See Summary Judgment at 21, App. 40a ("SDMI also argues that the Ordinance directly affects its operations in Ohio"). The defendants never denied that the ordinance would apply to all S.D. Myers employees in Ohio, since S.D. Myers intended to use Ohio based employees to perform the contract. Cf. Dana S. Myers Aff., ¶ 10, App. 97a. The trial court made no finding against S.D. Myers on this issue, for which it would have been required to give S.D. Myers the benefit of any doubt in granting summary judgment for the City. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("all justifiable inferences are to be drawn in [the nonmovant's] favor"); Fed. R. Civ. P. 56(e) (unrebutted affidavit must be taken as true). Yet the Ninth Circuit decided to construe the ordinance as not applying to S.D. Myers' Ohio employees. *S.D. Myers*, 253 F.3d at 468-69. In view of S.D. Myers' uncontroverted claim, this is an improper finding of fact on appeal.

In holding that the ordinance does not directly regulate interstate commerce unless it is facially invalid, the Ninth Circuit's opinion is in conflict with a recent decision of the Second Circuit as well as decisions of this Court. *See American Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2nd Cir. 2003) (Vermont's "harmful to minors" law a *per se* violation of the dormant Commerce Clause as applied to persons placing information on internet); *Healy*, 491 U.S. at 335-40 (practical effect of the statute was to control prices; facial invalidity was second ground for decision); *Brown-Forman*, 476 U.S. at 583-584 (statute invalid under as-applied analysis).[19]

III. THE NINTH CIRCUIT FAILED TO RECOGNIZE THAT A CITY HAS NO LEGITIMATE INTEREST IN PROTECTING NON-RESIDENTS.

This Court has held that a governmental entity has no legitimate interest in imposing burdens on interstate commerce to protect persons outside its borders:

> While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, *there is nothing to be weighed in the balance to sustain the law.*

Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (emphasis added). The Illinois statute at issue in *MITE* regulated corporate takeovers of public companies of which Illinois residents owned 10 percent or more of the stock. *Id.* at 626-27. The asserted justification for the ordinance was "to protect

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See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (Court of Appeals "should not simply have made factual findings on its own").

[19]On the other hand, to the extent the Ninth Circuit simply ignored the as-applied challenge, and held S.D. Myers to the higher standard of facial claims, this Court should exercise its supervisory power by vacating and remanding for consideration of the actual claim.

resident security holders . . . ." *Id.* at 644. But for most transactions regulated by the statute, the majority of the shareholders affected would be nonresidents. In addition, an exemption left shareholders without the protections the statute purportedly provided when it came to a corporation's purchase of its own shares. *Id.* The Court found that this inconsistency with the asserted purpose "undermine[d] appellant's justification for the burdens the statute impose[d] on interstate commerce." *Id.*

The Ninth Circuit's decision is in conflict with *MITE*. None of S.D. Myers' employees are San Francisco residents, so San Francisco has no legitimate interest in protecting them. Nevertheless, in purporting to weigh the burden on interstate commerce against the City's interest, the Ninth Circuit failed to recognize that there was no local interest to weigh.[20] *S.D. Myers*, 253 F.3d at 471-72. The court criticized S.D. Myers for being unable to quantify the economic impact of the ordinance on interstate commerce. *Id.* at 471 ("Myers . . . provides almost no indication of the economic impact of the Ordinance on interstate commerce").[21] But the court failed to articulate any legitimate interest of the City in the analysis. *Id.* at 471-72.

Simply put, the Court erred in failing to recognize that the City has no interest to weigh against the burden of imposing its social policy on employers with nonresident employees. Most of the employees affected by the San Francisco ordinance are nonresidents and never work in San Francisco. Even though a

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[20]This Court has held that where a burden on interstate commerce is indirect, "we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

[21]The court quoted S.D. Myers' response to an interrogatory related only to employees that would work on the contract, and ignored other responses that estimated that costs for domestic partner benefits would be equal to or greater than for married employees.

1998 court decision limits the City's ability to enforce the ordinance in all of a contractor's U.S. operations, as originally drafted and construed, "just over one percent of the complying companies" have chosen to limit the geographic reach of their domestic partner benefits. Five-Year Report at 1, 5-6, App. 104a, 112a. Of the companies that comply with the ordinance by offering domestic partner benefits, 3,405 offer them nationwide. *Id.* at 5, App. 112a (3,500-95). "City contractors offering domestic partner benefits employ *a nationwide pool* of approximately 1,722,000 people . . . ." *Id.* (emphasis added). Nearly 60 percent of contractors offering domestic partner benefits are located outside of San Francisco, and "can be found in at least 39 states and the District of Columbia, and in almost 500 cities nationwide." *Id.* at 6, App. 113a. The City clearly has no legitimate interest in imposing its policy choices on businesses operating outside its borders, particularly those with no San Francisco residents as employees. *MITE*, 457 U.S. at 644; *BMW*, 517 U.S. at 571; *Natsios*, 181 F.3d at 69.

Moreover, as in *MITE*, the City's purported interest in the ordinance is inconsistent with the actual effect. According to the City:

> San Francisco has a long tradition of including in City contracts a promise by contractors not to discriminate against their own employees based on their sexual orientation. The ordinance is designed to give economic meaning to the promise.

City's 9th Cir. Resp. at 1. If by "giv[ing] economic meaning" the City means economic benefit based on sexual orientation, the ordinance fails to serve the alleged purpose.[22] Significantly, the ordinance *permits contractors to comply by offering no employee benefits whatsoever*, and permits waivers from

[22]On the other hand, if "giv[ing] economic meaning" refers to exacting an economic penalty for noncompliance, the City has admitted a violation of the standard in *BMW*, 517 U.S. at 572.

compliance freely. As of November 14, 2002, San Francisco appears to have had contracts with 9,426 contractors, only 37 percent (3,501) of which offered domestic partner benefits to employees. Five-Year Report at 3, App. 108a.[23] Moreover, a Census 2000 report, also published after the decision at issue, demonstrates that 89 percent of domestic partner households are opposite-sex couples (who could marry if they wished to provide for each other financially). Tavia Simmons & Grace O'Neill, *Households and Families: 2000, Census 2000 Brief* at 7 (Sept. 2001).[24] Thus, it is clear that less than two fifths of San Francisco's contractors comply with the ordinance by offering domestic partner benefits, and most domestic partners are opposite-sex couples. Accordingly, the ordinance would provide only de minimus economic support for San Francisco's sexual orientation policy even if all the employees affected were in San Francisco.

Like the Illinois statute in *MITE*, the San Francisco ordinance primarily relates to persons outside its borders and fails to provide the benefits that purportedly justify its impact on interstate commerce. The Ninth Circuit should have followed *MITE* and held that San Francisco has no local interest to be weighed against the burden on interstate commerce. If a state has no legitimate interest in protecting residents of other states, neither does a city.

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[23]The Five-Year Report shows that the compliance status of 8,163 contractors has been determined, and another 1,263 contractors have received waivers. Five-Year Report at 3, 8 and Table 1, App. 106a, 116a. It is not clear from the report whether all of the contractors whose status has been determined currently have contracts with the city. Nevertheless, if they do not, their compliance is hardly relevant to any legitimate City interest.

[24]Available at www.census.gov/prod/2001pubs/c2kbr01-8.pdf. Census 2000 found that over the past ten years, "the number of unmarried-partner households had increased to 5.5 million, of which, 4.9 million consisted of partners of the opposite sex." *Id.* The 600,000 same-sex partner households constitute just over ½ of 1 percent of all households. *See id.* at 1 (105.5 million households).

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT CERTIORARI, VACATE THE NINTH CIRCUIT'S OPINION, AND REMAND FOR CONSIDERATION OF INFORMATION THAT WAS NOT BEFORE THE COURT AT THE TIME OF ITS OPINION.

This Court will grant certiorari, vacate the opinion and remand for further consideration ("GVR") when:

> intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . .

Lawrence v. Chater, 516 U.S. 163, 167 (1996); *see also Stutson v. United States*, 516 U.S. 193, 194 (1966) ("*Lawrence v. Chater* . . . contains a general discussion of the considerations that properly influence this Court in deciding whether to [GVR]").

There is a reasonable probability that the decision below rests upon stated assumptions that the Ninth Circuit would reject if given the opportunity to consider subsequent events. These developments include the conflicting legislation and the SFHRC Statistical Reports referenced above. Article 1, § 29 of the Nebraska Constitution and the proposed Michigan constitutional amendment give employers the right not to recognize "domestic partnerships." If the Ninth Circuit were to consider these inconsistent regulations, it should hold that the ordinance creates an impermissible conflict with legislation in other states. *Cf. S.D. Myers*, 253 F.3d at 469. The SFHRC Statistical Reports clearly reveal the extraterritorial effect of the ordinance. If the Ninth Circuit were to consider the SFHRC

Reports, it should hold that the ordinance has an extraterritorial effect and a direct impact on interstate commerce. Thus, at a minimum this Court should vacate the decision at issue and remand to permit the Ninth Circuit to consider the outcome-determinative facts that were not before it.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari.

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